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EXCEPTIONAL INNOVATION, LLC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

14 | EXCEPTIONAL INNOVATION, LLC,

Case No. 3:07-CV-02041-LAB-LSP

15 Plaintiff,

16 || vs.

17 || KONTRON AMERICA, INC.,

18 || Defendant.

**EXCEPTIONAL INNOVATION, LLC'S
ANSWER TO FIRST AMENDED
COUNTERCLAIM OF DEFENDANT
AND CROSS-COMPLAINANT
KONTRON AMERICA, INC.**

19 AND RELATED CROSS-ACTIONS.

21 Plaintiff Exceptional Innovation, LLC (“Exceptional Innovation”), by and through
22 counsel, hereby responds to Defendant Kontron America, Inc.’s (“Kontron”) First
23 Amended Counterclaim (“FACC”) against it, and states the following:

24 1. Exceptional Innovation incorporates by reference the allegations and
25 averments in its Complaint against Kontron as if fully set forth herein and further responds
26 to Kontron's FACC as follows:

27 2. Exceptional Innovation lacks sufficient knowledge or information to form a
28 belief as to the truth or falsity of the allegations contained on Paragraph 2 of the FACC and

1 therefore denies such allegations.

2 3. Exceptional Innovation admits the allegations contained in Paragraph 3 of
3 the FACC.

4 4. Exceptional Innovation admits the allegations contained in Paragraph 4 of
5 the FACC.

6 5. In response to Paragraph 5 of the FACC, Exceptional Innovation states that
7 the Sales Quotes and Terms and Conditions are written documents that speak for
8 themselves. Further responding, Exceptional Innovation denies that the “Agreement”
9 consists of the Sales Quotes and Terms and Conditions and denies all remaining
10 allegations contained in Paragraph 5 of the FACC.

11 6. Paragraph 6 of the FACC contains legal conclusions to which no response is
12 required. To the extent a response is required, Exceptional Innovation denies the
13 allegations contained in Paragraph 6 of the FACC.

14 7. Exceptional Innovation admits the allegations contained in Paragraph 7 of
15 the FACC, except that, to the extent “expressed an interest” is intended to indicate that
16 Exceptional Innovation sought out Kontron, such allegation is denied.

17 8. Exceptional Innovation admits the allegations contained in Paragraph 8 of
18 the FACC.

19 9. Exceptional Innovation admits the allegations contained in Paragraph 9 of
20 the FACC.

21 10. Exceptional Innovation admits that Kontron issued the two sales quotes
22 attached as Exhibit 1 on or about May 12, 2005, and denies the remaining allegations
23 contained in Paragraph 10 of the FACC.

24 11. In response to Paragraph 11 of the FACC, Exceptional Innovation states that
25 the Sales Quotes are written documents that speak for themselves. Further responding,
26 Exceptional Innovation denies the remaining allegations contained in Paragraph 11 of the
27 FACC.

28 12. Exceptional Innovation denies the allegations contained in Paragraph 12 of

1 the FACC.

2 13. Exceptional Innovation admits that it issued two Purchase Requests and that
 3 true and accurate copies of these requests are attached to Kontron's Answer and FACC as
 4 Exhibit 2 and were also attached to Exceptional Innovation's Complaint. Exceptional
 5 Innovation denies the remaining allegations contained in Paragraph 13 of the FACC.

6 14. In response to Paragraph 14 of the FACC, Exceptional Innovation states that
 7 the documents comprising the agreement are written documents that speak for themselves.
 8 Further responding, Exceptional Innovation denies the remaining allegations contained in
 9 Paragraph 14 of the FACC.

10 15. Exceptional Innovation admits that it received a reduction in the price it was
 11 originally to pay for Kontron's products. Exceptional Innovation also admits that Kontron
 12 issued the Sales Quote that is attached as Exhibit 1. Exhibit 1 is a written document that
 13 speaks for itself. Further responding, Exceptional Innovation denies any remaining
 14 allegations contained in Paragraph 15 of the FACC.

15 16. Exceptional Innovation admits that Kontron invoiced a reduced sum to
 16 Exceptional Innovation. Exceptional Innovation denies the remaining allegations
 17 contained in Paragraph 16 of the FACC.

18 17. Exceptional Innovation admits that Kontron eventually delivered products to
 19 it. Further responding, to the extent such is alleged, Exceptional Innovation denies that
 20 Kontron delivered conforming goods and that the delivery was timely. Exceptional
 21 Innovation denies any remaining allegations contained in Paragraph 17 of the FACC.

22 18. Exceptional Innovation admits that Kontron sent it the three invoices that are
 23 attached to the Answer and FACC as Exhibit 3. Exceptional Innovation denies any
 24 remaining allegations in Paragraph 18 of the FACC.

25 19. For its response to Paragraph 19 of the FACC, Exceptional Innovation states
 26 that the invoices attached as Exhibit 3 are written documents that speak for themselves.
 27 Further responding, Exceptional Innovation denies the remaining allegations contained in
 28 Paragraph 19 of the FACC.

1 20. For its response to Paragraph 20 of the FACC, Exceptional Innovation states
2 that the invoices attached as Exhibit 3 are written documents that speak for themselves.
3 Further responding, Exceptional Innovation denies the remaining allegations contained in
4 Paragraph 20 of the FACC.

5 21. For its response to Paragraph 21 of the FACC, Exceptional Innovation states
6 that the invoices attached as Exhibit 3 are written documents that speak for themselves.
7 Exceptional Innovation denies the remaining allegations contained in Paragraph 21 of the
8 FACC.

9 22. Exceptional Innovation denies the allegations contained in Paragraph 22 of
10 the FACC.

11 23. Exceptional Innovation denies the allegations contained in Paragraph 23 of
12 the FACC.

13 24. Exceptional Innovation incorporates its responses and averments in each of
14 the preceding paragraphs as if fully set forth herein.

15 25. Exceptional Innovation denies the allegations contained in Paragraph 25 of
16 the FACC.

17 26. Exceptional Innovation admits only that Kontron issued invoices and
18 delivered goods to it, but denies the remaining allegations contained in Paragraph 26 of the
19 FACC.

20 27. Exceptional Innovation denies the allegations contained in Paragraph 27 of
21 the FACC.

22 28. Exceptional Innovation admits that Kontron has demanded additional
23 payment from it, but denies the remaining allegations contained in Paragraph 28 of the
24 FACC.

25 29. Exceptional Innovation denies the allegations contained in Paragraph 29 of
26 the FACC.

27 30. Exceptional Innovation denies the allegations contained in Paragraph 30 of
28 the FACC. By way of further response, Exceptional Innovation denies that it is liable to

1 Kontron in the sum demanded, or in any sum.

2 31. Exceptional Innovation incorporates its responses and averments in each of
3 the preceding paragraphs as if fully set forth herein.

4 32. For its response to Paragraph 32 of the FACC, Exceptional Innovation states
5 that the documents comprising the agreement are written documents that speak for
6 themselves. Further responding, Exceptional Innovation denies the remaining allegations
7 contained in Paragraph 32 of the FACC.

8 33. Exceptional Innovation admits only that it initiated a lawsuit in Delaware
9 County Common Pleas Court on June 27, 2007 and denies the remaining allegations
10 contained in Paragraph 33 of the FACC.

11 34. Exceptional Innovation denies the allegations contained in Paragraph 34 of
12 the FACC.

13 35. Exceptional Innovation denies the allegations contained in Paragraph 35 of
14 the FACC. By way of further response, Exceptional Innovation denies that it is liable to
15 Kontron in any sum.

16 36. Exceptional Innovation incorporates its responses and averments in each of
17 the preceding paragraphs as if fully set forth herein.

18 37. Exceptional Innovation denies the allegations contained in Paragraph 37 of
19 the FACC.

20 38. Exceptional Innovation denies the allegations contained in Paragraph 38 of
21 the FACC.

22 39. Exceptional Innovation denies the allegations contained in Paragraph 39 of
23 the FACC.

24 40. Paragraph 40 of the FACC contains legal conclusions to which no response
25 is required. To the extent a response is required, Exceptional Innovation denies the
26 allegations contained in Paragraph 40 of the FACC. By way of further response,
27 Exceptional Innovation denies that it is liable to Kontron in any sum.

28 41. Exceptional Innovation incorporates its responses and averments in each of

1 the preceding paragraphs as if fully set forth herein.

2 42. Exceptional Innovation admits only that it purchased goods from Kontron,
 3 that Kontron delivered some goods to it, and that some of the deliveries were within the
 4 last two years. Exceptional Innovation denies the remaining allegations contained in
 5 Paragraph 42 of the FACC.

6 43. Exceptional Innovation denies the allegations contained in Paragraph 43 of
 7 the FACC.

8 44. Exceptional Innovation denies the allegations contained in Paragraph 44 of
 9 the FACC. By way of further response, Exceptional Innovation denies that it is liable to
 10 Kontron in the sum demanded, or in any sum.

11 45. Exceptional Innovation incorporates its responses and averments in each of
 12 the preceding paragraphs as if fully set forth herein.

13 46. Exceptional Innovation denies the allegations contained in Paragraph 46 of
 14 the FACC.

15 47. Exceptional Innovation denies the allegations contained in Paragraph 47 of
 16 the FACC. By way of further response, Exceptional Innovation denies that it is liable to
 17 Kontron in the sum demanded, or in any sum.

18 48. Exceptional Innovation incorporates its responses and averments in each of
 19 the preceding paragraphs as if fully set forth herein.

20 49. Exceptional Innovation admits only that it received some goods from
 21 Kontron, but denies the remaining allegations contained in Paragraph 49 of the FACC.

22 50. Exceptional Innovation denies the allegations contained in Paragraph 50 of
 23 the FACC.

24 51. Paragraph 51 of the FACC contains legal conclusions to which no response
 25 is required. To the extent a response is required, Exceptional Innovation denies the
 26 allegations contained in Paragraph 51 of the FACC.

27 52. Paragraph 52 of the FACC contains legal conclusions to which no response
 28 is required. To the extent a response is required, Exceptional Innovation denies the

1 allegations contained in Paragraph 52 of the FACC. By way of further response,
2 Exceptional Innovation denies that it is liable to Kontron in the sum demanded, or in any
3 sum.

4 53. Exceptional Innovation denies any and all allegations contained in Kontron's
5 FACC that are not specifically admitted herein.

AFFIRMATIVE DEFENSES

7 54. Kontron's FACC fails to state a claim on which relief can be granted.

8 55. To the extent Kontron's claims rely upon California law and this Court finds
9 California law inapplicable, such counts fail to state a claim on which relief can be
10 granted.

11 56. To the extent the agreement is governed by statute, Kontron's claims relying
12 upon common law fail to state a claim in which relief can be granted.

13 57. Exceptional Innovation is excused from further performance under the
14 agreement, including payment of any additional sums, due to Kontron's prior material
15 breaches.

16 58. Kontron's recovery is precluded in whole or in part by the doctrine of
17 unclean hands.

18 59. Kontron's recovery is precluded in whole or in part because the purpose of
19 the contract was frustrated.

20 60. Kontron's recovery is precluded in whole or in part to the extent that
21 Exceptional Innovation is entitled to an offset or deduction, based on its own damages.

22 61. Kontron's recovery is precluded in whole or in part by the applicable statutes
23 of limitations

24 62. Kontron's recovery is precluded in whole or in part by Kontron's failure to
25 perform

26 63. Kontron's recovery is precluded in whole or in part by the doctrines of
27 waiver and/or estoppel

²⁸ 64. Kontron's recovery is precluded in whole or in part by the doctrine of laches.

65. Kontron's recovery is precluded in whole or in part by Kontron's failure to act in good faith in the performance of its contractual obligations to Exceptional Innovation, and specifically, Kontron's bad faith.

66. Kontron's recovery is precluded in whole or in part by Kontron's unexcused delays in performance.

67. Kontron's recovery is precluded in whole or in part by its breaches of warranties with respect to the products sold to Exceptional Innovation.

68. Kontron's recovery is precluded in whole or in part by its intentional misrepresentations and fraud.

69. Kontron reserves the right to assert additional affirmative defenses as shall hereafter become known.

WHEREFORE, Plaintiff Exceptional Innovation, LLC respectfully requests that this Court enter judgment in its favor and against Defendant and Cross-Complainant Kontron America, Inc. on Kontron's FACC, along with such other and further relief as the Court deems appropriate.

Dated: April 17, 2008

RUTAN & TUCKER, LLP
JEFFREY WERTHEIMER
SUMMER YOUNG AGRIESTI

By: /s/ Agriesti

Summer Young Agriesti
Attorneys for Plaintiff and Counter-
Defendant EXCEPTIONAL
INNOVATION, LLC

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is Rutan & Tucker, LLP, 611 Anton Boulevard, Fourteenth Floor, Costa Mesa, California 92626-1931.

On April 17, 2008, I served the following described as:

**EXCEPTIONAL INNOVATION, LLC'S ANSWER TO FIRST AMENDED
COUNTERCLAIM OF DEFENDANT AND
CROSS-COMPLAINANT KONTRON AMERICA, INC.**

on all parties identified for Notice Of Electronic Filing generated by the Court's CM/ECF system in this case on this date in the following manner:

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(BY ELECTRONIC SERVICE) by causing the document to be served via the Court's ECF Filing System.

(FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

EXECUTED on April 17, 2008, at Costa Mesa, California.

Michelle Perciavalle
(Type or print name)

/s/